

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

IVAN BOYER

Claimant

VS.

TONY'S PIZZA SERVICE

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

Docket No. 138,009

ORDER

Claimant requests review of the Award of Administrative Law Judge George R. Robertson entered in this proceeding on September 26, 1994.

APPEARANCES

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. The respondent and its insurance carrier appeared by their attorney, Mickey W. Mosier of Salina, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

Because the Administrative Law Judge found claimant's asthmatic condition was neither an occupational disease nor a special risk of the employment, the Judge denied claimant's request for benefits. The claimant requested this review. The sole issue now before the Appeals Board is whether claimant has sustained either a personal injury by accident or acquired an occupational disease compensable under the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Appeals Board finds claimant has acquired an occupational disease as defined by K.S.A. 44-5a01(b) and, therefore, this proceeding should be remanded to the Administrative Law Judge for determination of the unresolved issues of nature and extent of disability and whether claimant is entitled to future medical benefits.

Both medical experts who testified, board certified pulmonologist Kent Berquist, M.D., and board certified pulmonologist Thomas J. Bloxham, M.D., believe claimant has hyperreactive airway disease and permanent impairment as a result of that condition. Dr. Berquist, who treated claimant, believes claimant has a permanent functional impairment in the range of ten to twenty-five percent (10-25%), whereas Dr. Bloxham, an expert hired by respondent to evaluate claimant, believes claimant has a permanent functional impairment of not more than fifteen percent (15%). During their depositions, either one or both of the doctors referred to claimant's condition as bronchial hyperreactivity, chronic cough, asthma, bronchitis, industrial bronchitis, cough variant asthma, and chronic tracheal bronchitis. However labeled, claimant has inflammation and irritation of the lining of the windpipe and bronchial tubes that causes chronic, and sometimes violent, cough.

The principal issue on this review is whether claimant's work around chemicals while employed by respondent caused or permanently aggravated the hyperreactive airway disease. Dr. Berquist is definite in his opinion that claimant's exposure to irritants and chemicals while working for the respondent caused the condition and permanent impairment. On the other hand, Dr. Bloxham is unable to determine the cause of claimant's condition, but believes that general class of chemicals claimant worked around was not classically associated with causing asthma although those chemicals certainly could exacerbate preexisting problems or cause irritation to the respiratory tract.

Claimant alleges he sustained personal injury by accident that resulted in industrial bronchitis as a result of working around several chemicals at respondent's plant during a ten (10) week period ending in June 1989. Although claimant experienced no difficulties working in the chemical room where he mixed various cleaners and sanitizers, claimant testified his symptoms began when he was transferred to the sanitation crew where he would apply a degreasing agent to plant equipment and would later rinse the equipment with a chlorine solution. Although the symptoms of burning throat and watery eyes resolved, the chronic cough did not. At times, claimant's cough is so violent it causes him

to soil his pants. Initially claimant experienced a coughing spell three or four times daily while working for respondent, however, the number of spells has now decreased to approximately one episode per week.

Based upon the evidence presented, the Appeals Board finds claimant has developed an occupational disease as defined by K.S.A. 44-5a01 as a result of his exposure to chemicals while working for the respondent and is entitled to benefits under the Kansas Workers Compensation Act. Occupational disease is defined by K.S.A. 44-5a01(b). Generally speaking, an occupational disease must (1) arise out of and in the course of employment; (2) result from the nature of the employment; and (3) have been actually contracted while engaged in the employment. In addition, before the disease may be considered occupational, the employment must hold a particular or peculiar hazard to acquire such disease which distinguishes the employment from other occupations and employment, and which creates a hazard of acquiring such disease which is in excess of the risk of such disease in general. Also, the occupational disease statute excludes from the definition of occupational disease ordinary diseases of life to which the general population may be exposed.

The Appeals Board finds claimant's hyperreactive airway disease resulted from his direct exposure to chemicals while working for the respondent. We also find the disease resulted from the nature of claimant's employment which was applying and removing chemical agents. The Appeals Board also finds claimant's job exposed him to special risks of developing hyperreactive airway disease as a result of chemical exposure, a risk other occupations would not have.

The Appeals Board also finds claimant's hyperreactive airway disease is not an ordinary disease of life or a condition to which the general public is exposed. Although the term "ordinary diseases of life" is not defined by the Workers Compensation Act, the Appeals Board finds the Legislature intended to exclude as occupational diseases such illnesses and maladies that have no special risk or relationship to the employment or job being performed. Due to the individual nature of each occupation, the question whether an illness falls under the definition of an occupational disease or ordinary disease of life, must be decided on a case-by-case basis. The question is not whether the illness is commonly diagnosed, but whether the employment presents a peculiar or special risk to acquire that disease.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge George R. Robertson dated September 26, 1994, should be, and hereby is, reversed; that this proceeding is remanded to the Administrative Law Judge for determination of the remaining issues of nature and extent of disability and claimant's entitlement to future medical benefits. The Appeals Board does not retain jurisdiction over this review.

IT IS SO ORDERED.

Dated this ____ day of July, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I agree the case should be remanded to the Administrative Law Judge for additional findings. However, I believe claimant has proven he sustained personal injury by accident arising out of and in the course of his employment with the respondent. The issue presented to the Administrative Law Judge was whether claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent. When stipulations were taken at the time of regular hearing, occupational disease was never mentioned as an issue to be decided by the Administrative Law Judge.

Because the case was tried as an accidental injury, and because the evidence both indicates claimant was exposed to the chemical agents for a relatively short period of time and he has sustained a lesion or change in his bronchial tubes as a result of that exposure, I believe claimant has proven both accidental injury and occupational disease. As indicated by a review of Kansas cases, in many instances an affliction can be considered either an accidental injury or occupational disease.

BOARD MEMBER

c: John M. Ostrowski, Topeka, Kansas
Mickey W. Mosier, Salina, Kansas
George R. Robertson, Administrative Law Judge
David A. Shufelt, Acting Director